Supreme Court U. S.
FILED
OCT 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-211

JAMES DALTON,
Petitioner

vs.

INDIANA REFRIGERATOR LINES, INC.
Respondent

BRIEF OF RESPONDENT INDIANA REFRIGERATOR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FELSON BOWMAN
Indianapolis, Indiana
Attorney for Respondent

Of Counsel:

LEWIS BOWMAN ST. CLAIR
BENNETT & WAGNER
5101 Madison Avenue
Indianapolis, Indiana 46227

TABLE OF CONTENTS

	Page
AUTHORITIES	ii
ISSUES PRESENTED	vi
REASONS FOR DENYING THE WRIT	1
A. THE DECISION OF THE COURT OF APPEALS BELOW ACCORDS WITH SETTLED PRACTICE IN CASES WHERE AVOIDANCE OF A CONTRACTUAL OBLIGATION IS SOUGHT ON GROUNDS OF FEDERAL REGULATORY POLICY	1
B. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THIS CASE CORRECTLY IMPLEMENTS THE POLICIES OF CONGRESS AND THE INTERSTATE COMMERCE COMMISSION TOWARD AGRICULTURAL TRANSPORT AND THE ROLE OF LEASING PRACTICES IN AGRICULTURAL TRANSPORT	5
C. THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL OR STATE COURTS	13
D. THE "OTHER ISSUES" RAISED BY PETITIONER ARE NOT CLEARLY RAISED BY THE RECORD IN THIS CASE, AND ARE NOT SUBSTANTIAL	23
CONCLUSION	25
APPENDIX	

AUTHORITIES

Cases	Page
Adams Export Co. v. Croninger, 266 U.S. 491 (1931)	10
Alford v. Major, 314 F.Supp. 979 (N.D. Ind. 1970), affirmed 470 F.2d 132 (7th Cir. 1972)	13,16, 17,18,19, 20,22
Allstate Insurance Co. v. Alterman, Transport Lines, 465 F.2d 710 (5th Cir. 1972)	14,17,18
American Transport Association v. United States, 344 U.S. 296, 73 S.Ct. 307, 97 L.Ed. 337 (1952)	7
Baltimore and Ohio Southwestern Railway Co. v. Voigt, 176 U.S. 498, 20 S.Ct. 387, 44 L.Ed. 560 (1900)	2
Beasley v. Texas and Pacific Railway Co., 191 U.S. 492 (1903)	2
Carolina Freight Carriers Corp. v. Pitt County Transportation Co., 492 F.2d 243 (1974)	14,18
Costello v. Smith, 179 F.2d 715 (2d Cir. 1949)	21
Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc., 190 Neb. 231, 207 N.W.2d 368 (1973)	20
Gordon Leasing v. Navajo Freight Lines, 130 N.J. Super. 290, 326 A.2d 114 (1974)	21

AUTHORITIES (Continued)

Cases	Page
Indiana Insurance Co. v. Parr Trucking Service, Inc., 510 F.2d 490 (6th Cir. 1975)	13,19
Jones Truck Lines, Inc. v. Ryder Truck Lines, 407 F.2d 100 (6th Cir. 1975)	13,18
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)	20
Missouri Pacific Railroad Co. v. Elmore and Stahl, 377 U.S. 194 (1964)	10
Muschany v. United States, 324 U.S. 49 (1945)	2
Rice v. Sioux City Memorial Park Cemetary, 348 U.S. 70 (1955)	25
Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938)	25
S.S. Monrosa v. Carbon Black Export, 359 U.S. 180 (1959)	20
Scott Truck Lines, Inc. v. Chicago, Rock Island and Pacific Railroad Co., 312 F.Supp. 511 (N.D. Ill. 1970)	10
Secretary of Agriculture v. United States, 350 U.S. 162 (1956)	10
Simmons v. King, 478 F.2d 857, (5th Cir. 1973)	17,18

Cases — Page

Southwestern Sugar and Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959)..... 3

Steele v. Drummond, 275 U.S. 199 (1927)..... 2

Twin City Pipeline Co. v. Harding Glass Co., 283 U.S. 353..... 2

Wear v. Brada-Miller Freight Systems, Inc., Civil Docket No. 73-1773 (7th Cir. May 6, 1974), Petition for Certiorari granted, 43 U.S.L.W. 3493 (No. 74-54)..... 9,13,17, 18,19,22

STATUTES:

Motor Carrier Act, Part II of the Interstate Commerce Act, 49 U.S.C. §301 et seq. (1970)

- - - 49 U.S.C. §20(11)..... 21

- - - 49 U.S.C. §303(b)..... 8

- - - 49 U.S.C. §304(e)..... 7,9

- - - 49 U.S.C. §304(f)..... 7

- - - 49 U.S.C. §319..... 21

Page

INTERSTATE COMMERCE COMMISSION PROCEEDINGS AND REGULATIONS:

PROCEEDINGS:

Lease and Interchange of Vehicles by Motor Carriers, Ex Parte No. MC-43;

52 M.C.C. 675 ff..... 6,11

REGULATIONS:

49 C.F.R. 1057.4(a)..... 8,9,11

OTHER AUTHORITIES:

H.R. Rep. 2425, 84 Cong. 2d Sess. (1956); 1956 U.S. Code Cong. and Admin. News, 4304 ff..... 7

Restatement, Contracts §512..... 2

ISSUE PRESENTED

WHETHER AN INDEMNITY PROVISION IN A TRIP-LEASE AGREEMENT, BY WHICH A SUPPLIER OF EQUIPMENT AND DRIVER AGREE TO INDEMNIFY AN INTERSTATE MOTOR VEHICLE CARRIER, IS UNENFORCEABLE AS AGAINST PUBLIC POLICY ESTABLISHED BY 49 U.S.C. §304(e) AND 49 C.F.R. §1057.4(a)(4).

JURISDICTION

THE PETITION OF JAMES DALTON ADEQUATELY PRESENTS THE GROUNDS FOR JURISDICTION ON THIS ISSUE.

STATEMENT OF THE CASE

THE PETITION OF JAMES DALTON ADEQUATELY STATES THE CASE FOR PURPOSES OF A DETERMINATION ON WHETHER OR NOT TO GRANT A PETITION FOR CERTIORARI.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-211

JAMES DALTON,

Petitioner,

vs.

INDIANA REFRIGERATOR LINES, INC.,

Respondent

BRIEF OF RESPONDENT, INDIANA REFRIGERATOR LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, Indiana Refrigerator Lines, Inc., respectfully states that the Petition for a Writ of Certiorari, filed by James Dalton, should be denied.

REASONS FOR DENYING THE WRIT

A. THE DECISION OF THE COURT OF APPEALS BELOW ACCORDS WITH SETTLED PRACTICE IN CASES WHERE AVOIDANCE OF A CONTRACTUAL OBLIGATION IS SOUGHT ON GROUNDS OF FEDERAL REGULATORY POLICY.

This case involves an attempt by a trip-lessor of a motor vehicle (Petitioner) to avoid a contractual obligation to indemnify the trip-lessee (Respondent), a carrier certificated by the Interstate Commerce Commission, for a cargo loss occurring during the performance of the trip-lease. The basis on which the contractual obligation is sought to be avoided by Petitioner is a public policy defense derived from an I.C.C. regulation, 49 C.F.R. §1057.4(a)(4). The I.C.C. regulation does not, in terms, expressly prohibit indemnification of lessees by lessors for cargo losses. The defense to the contractual obligation contended for by Petitioner is therefore a "public policy defense" drawn from general regulatory goals. The contract sought to be avoided is not an "illegal bargain" in any strict sense of the term. C.f., Restatement, Contracts

§512, Comment c.

The public policy defense is one which the courts disfavor, Steele v. Drummond, 275 U.S. 199 (1927), particularly where there is no inequality of bargaining power and the contract sought to be avoided is one freely entered into. Baltimore and Ohio Southwestern Railway Co. v. Voigt, 176 U.S. 498 (1900).

The general rule is that where avoidance of a contractual obligation is sought on grounds of public policy, the public policy must be articulated clearly and of great weight. Twin City Pipeline Co. v. Harding Glass Co., 283 U.S. 353 (1931). It must be derived from authoritative expressions of the sovereign, and not from the predilections of the individual judge. Muschany v. United States, 324 U.S. 49, 64 (1945); Twin City Pipeline Co., supra. Finally, it must be shown that avoidance of the contractual obligation promotes a principle or an interest of general public concern, and not a mere private benefit. Beasley v. Texas and Pacific Railway Co., 191 U.S. 492 (1903).

Where the public policy urged is one to be derived from a complex regulatory scheme, the Courts are particularly cautious in avoiding contractual obligations on that ground. Mr. Justice Harlan's opinion in Southwestern Sugar and Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959) suggests the considerations pertinent to evaluation of a public policy defense to an otherwise valid contract, in a regulatory context. That case involved a claim by a shipper against a regulated water carrier for a cargo loss. The carrier defended in part on the basis of an exculpatory clause in a published tariff filed with the I.C.C. In sustaining the conclusion of the Fifth Circuit that the clause should not be struck down as a matter of law, Justice Harlan states, at 360 U.S. 411, 421:

> 'Cases are not decided nor the law appropriately understood, apart from an informed and particularized insight into the factual controversy under litigation.' Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 498, 78 S.Ct. 851, 2 L.Ed.2d 926, 938 (1958). This principle has particular force when the courts are asked to strike down on grounds of public policy a contractual arrangement on its face consensual.

Where the I.C.C. has not brought its informed insight to bear on the problem at issue, the federal courts have invariably refused to create an inflexible rule of broad applicability for the complex reality of interstate transportation.

The very silence of the I.C.C. on the question raised by Petitioner militates against acceptance of jurisdiction to review this case. The Sixth Circuit in effect has said that given the lack of explicit and detailed guidance from the I.C.C., it will not presume that the normal common-law rules for apportioning responsibility for loss--both contract and tort--should be abandoned. Its decision says only that indemnification in the case at bar is not as a matter of law prohibited. The position of the Sixth Circuit is a perfectly sensible position given the settled policy of judicial deference to administration expertise, where the deference will avoid interference with the regulatory scheme. It is especially appropriate in an I.C.C. context, where the practice of Congress has been to codify and/or lease intact common law rules governing the

relationship between carrier and shipper.

As Respondent suggests below, the policies of Congress and the I.C.C. toward the use of leasing devices in the area of agricultural transport are extremely complex. This Court is ill-equipped to marshall the intricate facts and to make the informed economic and regulatory judgments required for correct resolution of the issues presented. It should not ignore the counsel of caution and reticence of Mr. Justice Harlan in the River Terminals case, supra, and should let stand the decision of the Sixth Circuit in this case.

B. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THIS CASE CORRECTLY IMPLEMENTS THE POLICIES OF CONGRESS AND THE INTERSTATE COMMERCE COMMISSION TOWARD AGRICULTURAL TRANSPORT AND THE ROLE OF LEASING PRACTICES IN AGRICULTURAL TRANSPORT.

1. Analysis of Ex Parte No. MC-43, Lease and Interchange of Vehicles, and Congressional Response Thereto.

The regulation from which the public policy urged by Petitioner is drawn was originally promul-

gated by the I.C.C. in Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers, 52 M.C.C. 675 (1951). In that proceeding, the I.C.C. sought to control the use of non-owned equipment by regulated motor carriers.

The I.C.C. was concerned with three substantive ills when it promulgated its regulations in Ex Parte No. MC-43:

(1) Unlawful delegation of operating authority by licensed carriers to unlicensed carriers, subversive of the Motor Carrier Act certification scheme;

(2) Circumvention of safety regulations, resulting in unsafe vehicles and exhausted drivers being on the road;

(3) Loose, informal arrangements, whereby shippers and the public having claims against a licensed carrier would have great difficulty establishing primary liability for injuries suffered.

The effect of the regulations was, among other things, to abolish trip-leasing, on the basis that that particular use of non-owned vehicles was particularly likely to contribute to these ills. The Supreme Court, recognizing this effect of the regulations, held that the I.C.C. had power under the

Motor Carrier Act to accomplish that result. American Transport Association v. United States, 344 U.S. 298 (1951). Congress then amended the Motor Carrier Act by adding sections 204(e) and 204(f), 49 U.S.C. §§304(e), 304(f), which were intended to preserve the practice of trip-leasing between exempt haulers of agricultural commodities like Petitioner Dalton and certificated carriers. The intent of Congress to preserve the practice is clear:

> If trip-leasing were abolished, truck haulers of agricultural commodities, livestock, and fish, who now obtain return hauls by leasing their trucks to authorized motor carriers, would no longer be able to do so, but would have to charge more for hauling such products, thereby necessitating an increase in the cost of marketing and the spread between farm and consumer prices. The economic loss involved in such wasteful use of equipment, manpower, and gasoline would be reflected in higher prices to consumers, or lower prices to farmers and other producers, or both. It is doubtful, indeed, whether the exempt haulers of agricultural commodities, livestock, and fish would be able to survive under these conditions.

H.R. Rep. 2425, 84th Cong., 2d Sess. (1956); 1956 U.S. Code Cong. and Admin, News, 4307. The determination of Congress to preserve trip-leasing between exempt and certificated carriers is reflected in the

present language of the regulations. See, 49 C.F.R. §1057.4(a)(3)(Appendix, p. 3a ff.)

The Congressional mandate to preserve trip-leasing requires accommodation between potentially conflicting regulatory goods--preservation of the economic viability of the agricultural transport sector exempted from regulation by 49 U.S.C. §303(b) on the one hand; on the other hand, promotion of highway safety and providing injured shippers and other members of the public with financially responsible defendants. The I.C.C. is best equipped to perform the detailed task of accommodation, not this Court. If this Court were to grant a writ of certiorari in this case, it would have to decide whether an inflexible rule insulating the lessor-exempt carrier from liability to a shipper for a cargo loss is good or bad regulatory policy. It would have to make this decision without guidance from other court cases (see below, pp. 13-22) and without guidance from the I.C.C., which has never explicitly considered the question. The Seventh Circuit is probably over-confident when it badly

asserts in Wear v. Brada-Miller Freight Systems, Inc., Civil Docket No. 73-1773 (7th Cir. May 6, 1974), Petition for Certiorari granted, 43 U.S.L.W. 3493 (No. 74-54), that:

> . . . (W)e interpreted the regulations as requiring the party who has the duty of responsibility and control under 49 U.S.C. §304(e) to internalize the cost of any breach of this duty. (p. 7)

Its assertion is without question overly broad and inapplicable to the specialized situation prevailing in the agricultural transport sector.

2. Analysis of the Present Language of 49 U.S.C. §§304(e) and 304(f) and of 49 C.F.R. §1047.4(a)(4).

Petitioner attempts to gloss over the difficulty of the regulatory judgment he seeks from this Court by making references to the "clear meaning" of the language of 49 C.F.R. 1057.4(a)(4). Neither the language of the regulation nor the language of 49 U.S.C. §304(e) supports Petitioner's position that enforcement of an indemnification clause in this case necessarily undermines regulatory policy.

Petitioner argues that enforcement of indemnification between the parties to a trip-lease is con-

trary to the language of §304(e) to the effect that the certificated carrier (lessee) ". . . will be fully responsible for the operation (of the leased vehicle) in accordance with applicable law and regulations as if they were the owner of such vehicles." The language "in accordance with applicable law and regulations" must be interpreted in light of settled practice construing the language of the Interstate Commerce Act as leaving intact or codifying common-law rules of substantive liability governing the common carrier relationship. Secretary of Agriculture v. United States, 350 U.S. 162 (1956); Missouri Pacific Railroad Co. v. Elmore and Stahl, 377 U.S. 194 (1964). Adams Export Co. v. Croninger, 266 U.S. 491 (1913).

Petitioner contends that the statute renders indemnification illegal per se in the circumstances of this case. However, indemnification for cargo loss between "initial" and "connecting" carriers is not per se illegal at common law, or under the Interstate Commerce Act. C.f., Scott Truck Lines, Inc. v. Chicago, Rock Island, and Pacific Railroad

Co., 312 F.Supp. 511 (N.D. Ill. 1970); 49 U.S.C. §§20(11) (1970), (The "Carmack Amendments").

Petitioner also asserts that indemnification is prohibited by language in 49 C.F.R. 1057.4(a)(4) requiring the lessee to assume "exclusive possession, control and use of the equipment, and for the complete assumption of responsibility in respect thereto . . . ." This language is in fact irrelevant to this case, because--unlike the Fifth and Seventh Circuit cases--this case does not involve a loss resulting from operation of the equipment, an accident, etc. This case involves a theft of the cargo by Petitioner's employee. If the regulations of the I.C.C. required Petitioner's employee to be considered for all purposes as the employee of Respondent, the question would be closer.

The I.C.C. does not so require, and in Ex Parte No. MC-43 explicitly rejected a proposal which would have had that effect. Compare, Rule II(g) proposed by the Hearing Examiner in Ex Parte No. MC-43, 52 M.C.C. 675, 734, with the rule adopted by the I.C.C. Rule 207.4(e), 52 M.C.C. 675,.747, 49 C.F.R.

1057.4(e).

The "clear language" of the statute and regulations do not give the Court any guidance in making the regulatory judgments required for proper disposition of this case.

3. The Intent of Congress and the I.C.C. To Tolerate Trip-Leasing between Exempt and Certified Carriers would be Frustrated by a Decision in this case Contrary to that of the Sixth Circuit.

Petitioner argues, in support of his assertion that regulatory policy is undermined by the decision of the Sixth Circuit, that as a result of that decision exempt haulers will be required to carry cargo insurance, and that this will cause their costs to rise. (Petition, p. 13). As a matter of fact, exempt haulers do carry cargo insurance; Petitioner's speculation is without foundation in reality. The proper question--on which the informed judgment of I.C.C. is lacking at the present time--is whether the insulation from liability, which a blanket rule denying indemnification would entail, would reduce the incentive of exempt haulers to exercise care in the performance of trip-leased carriage. If the

incentive to use care is reduced, certificated carriers like Respondent will be unwilling to entrust exempt carriers with high-risk lading, like the meat involved in this case, and will be unwilling to permit exempt carriers to trip-lease their backhauls. Such a result runs counter to Congressional policy attempting to preserve the viability of the agricultural exemption by tolerating the practice of trip-leasing.

C. THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL OR STATE COURTS.

In Part 2 of his Petition, Dalton contends that the decision in this case conflicts with decisions in the Seventh Circuit holding indemnification clauses in trip-leases unenforceable. Alford v. Major, 470 F.2d 132 (1972) and Wear v. Brada-Miller Freight Systems, Inc., Civil Docket No. 73-1773 (7th Cir. May 6, 1974). Petitioner notes that the Sixth Circuit in Jones Trucklines, Inc. v. Ryder Truck Lines, 407 F.2d 100 (6th Cir. 1975); Indiana Insurance Co. v. Parr Trucking Service, Inc., 510

F.2d 715 (6th Cir. 1975), the Fourth Circuit in Carolina Freight Carriers Corp. v. Pitt County Transport Co., 492 F. 243 (1974) and the Fifth Circuit in Allstate Insurance Company v. Alterman Transport Lines, 465 F.2d 710 (1972) have also enforced indemnification provisions.

Respondent contends that the instant case differs in two crucial respects from the Fourth, Sixth and Seventh Circuit cases cited by Petitioner. First, this case is the only one decided by a federal court of appeals or a state appellate court involving the special policies applicable to trip-leases between an exempt agricultural hauler and a certificated carrier. Second, this is the only case decided by a federal court of appeals where the loss for which indemnification is sought is a cargo loss. As rehearsed below, at pages 17-18, the rule making Respondent primarily liable to the shipper for this sort of loss is created by statute, and the leasing regulations are irrelevant as a source for that rule.

1) The policies of Congress and the I.C.C. in the respective areas of agricultural transport and lease and interchange of vehicles have been balanced so as to permit the practice of trip-leasing between exempt haulers of agricultural commodities and certificated carriers. This policy decision was based on the specialized economy of agricultural transport.

This case, unlike any of the federal cases cited by Petitioner for the proposition that a conflict exists among state and federal appellate courts, does fall in the complex area of agricultural transport and the particularized policy matrix devised by Congress and the I.C.C. for agricultural transport. Irrespective of result, the considerations of policy considered to be determinative in the Fourth, Fifth, Seventh and other Sixth Circuit cases and in the state court cases cited by Petitioners are not applicable to this case. There is no conflict between the decision in this case and the Seventh Circuit cases, because the regulatory policies perceived

by Seventh Circuit--whether correctly or not--are wholly inapplicable in the specific regulatory context within which this case arises.

In Alford v. Major, the Seventh Circuit was faced with an interchange of vehicles between two certificated carriers. The effect of the use by the certificated carrier of the non-owned equipment was to permit the owner of the equipment--who was also certificated--to operate the equipment outside the limits of the owner's operating authority. Alford did not involve an exempt carrier whose economy--in order to remain viable--requires the ability to utilize the operating authority of others.

The facts of Alford disclosed that the delegation-of-operating-authority problem (see above, p. 5) was directly implicated by the specific use of non-owned vehicles in that case. The Seventh Circuit could have believed that the vehicle owner was using the interchange arrangement to unlawfully enlarge the scope of its authority granted by the I.C.C., and that conversely the lessee was using

non-owned equipment to provide the service which it had represented to the I.C.C. it was ready and able to perform as a condition of its permit. The Seventh Circuit could then have reasoned that in order to deter unlawful delegations of operating authority, it should devise from the language of Regulation 49 C.F.R. §1057.4(a)(4) a black-letter rule of civil liability for damages inflicted in the course of an unlawful delegation of operating authority. C.f., Wear v. Brada-Miller Systems, Inc., supra. In Wear, the Seventh Circuit rejected an attempt to distinguish Alford on its facts. The hostility to leasing practices evident in Wear runs directly counter to Congressional tolerance of leasing in the agricultural transport area; however, the Seventh Circuit was not presented with a case involving agricultural transport.

The rationale for the decisions in Alford and Wear does directly conflict with the approach of the Fifth Circuit in Alterman Trucklines, Inc., above, and Simmons v. King, 478 F.2d 857 (5th Cir.

1973), followed by the Sixth and Fourth Circuits. In those cases, the Fifth Circuit utilized State common-law principles of contract and tort liability to apportion liability between lessor and lessee for personal injury caused by the negligence of the lessor's employee.

Thus in Alterman the indemnification clause was enforced according to its terms, no negligence attributable to the lessee appearing. In Simmons, the case was remanded for factual determinations of the common-law elements of vicarious liability for the tort of a servant.

The question along which the Fifth and Seventh Circuits divide can be stated as follows:

> Does the I.C.C. policy derogating the practice of trip-leasing necessarily prohibit the use of contractual devices to allocate liability for damage between owner and lessee of a motor vehicle?

The Seventh Circuit answers this question "yes," in Alford and Wear, supra. The Fifth Circuit in Simmons and Alterman, the Fourth Circuit in Pitt County, and the Sixth Circuit in Jones Trucklines, Inc. v. Ryder Truck Lines, 507 F.2d 100 (6th Cir.

1975) and Indiana Insurance Co. v. Parr Trucking Service, Inc., 510 F.2d 490 (6th Cir. 1975), answer this question "no."

However, the instant case arises in a completely different regulatory context from those cases. The decisions of the Seventh Circuit in Alford and Wear v. Brada-Miller Systems, Inc., seems predicated solely on a perception of regulatory hostility to the practice of trip-leasing. The policy of Congress and the I.C.C. is to encourage, not limit or derogate, the use of trip-leasing between exempt haulers and certificated carriers, which is the situation in the instant case. The common question posed in the Fifth and Seventh Circuit cases, answers to which conflict, is not raised in the instant case because of the specialized policy expressly articulated by Congress and the I.C.C. for agricultural transport. The decision in this case does not and cannot conflict with the appellate decisions cited by the Petitioner because the policy question asked and answered in those cases is not

at issue in this case. C.f., S.S. Monrose v. Carbon Black Export, 359 U.S. 180 (1959). Certiorari predicated on the ground of conflict between the circuits over regulatory policy should be denied in this case. Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923).

The state court cases cited by Petitioner for the proposition that a conflict exists among appellate courts present a slightly different issue concerning the jurisdiction of this Court. To the extent that they purport to interpret federal policy and rely on the perceived hostility to trip-leasing of Alford v. Major, they are wrong (Part B above); they are of no particular authority and they do not in fact conflict with the decision in this case for the reasons set out immediately above. For these reasons, the asserted conflict between the decision of the Sixth Circuit in the instant case and the decisions of the Supreme Court of Nebraska in Denver Midwest Motor Freight, Inc. v. Busboom Truck, Inc., 190 Neb. 231, 207 N.W.2d 368 (1973) and the New Jersey court in Gordon

Leasing v. Navajo Freight Lines, 130 N.J. Super. 290, 326 A.2d 14 (1973) does not in fact exist, and should not be the basis on which certiorari is granted.

2. The federal cases cited by Petitioner all involve indemnification for losses paid to a personal injury victim. Prior to the adoption of the leasing regulations in Ex Parte No. MC-43, the courts had utilized the Motor Carrier Act to create a new common law rule of vicarious liability, in order to ensure that the accident victim would be compensated. C.f., Costello v. Smith, 179 F.2d 715 (2d Cir. 1949), opinion of Learned Hand. Protection of the shipper does not require this judicial inventiveness, inasmuch as he is protected by 49 U.S.C. §319, and 49 U.S.C. §20(11) which render the carrier issuing the bill of lading primarily liable to the shipper. Respondent, recognizing that its primary liability to the shipper for cargo loss was clear as a matter of statute, paid the shipper promptly before seeking indemnification. The policy concerns expressed

by the Seventh Circuit in Alford and Brada-Miller to afford an accident victim redress, are addressed to a different sort of loss, on which Congress has not specifically acted. Congress has made the initiating carrier primarily liable for cargo loss; but, Congress has not stated or implied that, where two or more carriers participate in performing the transportation service, they may in no event apportion liability by contract between themselves. The policy with respect to allocation of liability for cargo loss is to ensure that incentive remains for all participating carriers to use reasonable care in providing the transportation service.

There is thus no conflict between the decision in this case and the Seventh Circuit decisions because the nature of the losses at issue in the respective cases differ in ways Congress has recognized and acted on. Certiorari should be denied.

D. THE "OTHER ISSUES" RAISED BY PETITIONER ARE NOT CLEARLY RAISED BY THE RECORD IN THIS CASE, AND ARE NOT SUBSTANTIAL.

The second issue purportedly presented by the application for certiorari is stated as:

> Whether such indemnity agreement is too vague and ambiguous to apply to the facts of this case.

This issue concerning the contract law of Tennessee was not raised by Respondent in its appeal to the Sixth Circuit from the decision of the U.S. District Court for the Middle District of Tennessee. It was not raised below in the form presented by Petitioner to this Court. Petitioner raised this issue below apparently as an alternative ground for affirmance.

Respondent, Appellant below, took the position at oral argument that any issue of contract interpretation had been resolved by the District Court in favor of Appellant, and, not being presented by a cross appeal, the issue was not properly before the Sixth Circuit. Alternatively, Respondent argued that there was insufficient facts in the trial court record to support the

contract construction contended for by Petitioner as an alternative ground for affirmance, and that the Sixth Circuit, if it were of a mind to consider the issue, should remand for further findings by the trial court. The Sixth Circuit did not consider the question in its order reversing and remanding to the trial court. (Petition; Appendix, p. 1a ff.)

Judge Morton, for the Middle District of Tennessee, effectively resolved the issue adversely to Petitioner in his order of July 18, 1975, granting Respondent a judgment. (Appendix, p. 7a) This order has not been appealed by Petitioner. In brief, the record in this issue does not have the clarity and focus required for consideration by the U. S. Supreme Court. Indeed, on the present record, there is probably no jurisdiction in this Court to consider the question.

This issue is addressed in Section II, F of Petitioner's Brief, pp. 21-22. There, Petitioner makes various assertions about state contract law.

Whether those assertions are correct or not, questions of that nature in a diversity case do not have the general significance required of U.S. Supreme Court cases. Ruhlin v. New York Life Insurance Co., 304 U.S. 202 (1938). "(This Court does not) sit for the benefit of the particular litigants. . . . (citations omitted) . . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70, 74 (1955), opinion of Frankfurter, J. A question of Tennessee contract law--imperfectly litigated in the trial court not considered by the Court of Appeals below, and resolved against the Petitioner on remand--does not provide a basis for a grant of certiorari by the U.S. Supreme Court.

CONCLUSION

Petitioner's assertion that regulatory policy is undermined by the decision of the Sixth Circuit below is unfounded. Petitioner seeks to have this Court inject itself into a complex regulatory

scheme without guidance from the I.C.C. and without a detailed factual record. Petitioner requests this Court to create a black-letter rule of law based solely on the laconic words of an I.C.C. regulation, which has the potential for a wide-ranging disruption of motor carrier regulation. The Court should refuse to review the complex questions sought to be presented in this case.

Petitioner's assertion that the decision in this case conflicts with the decisions of the Seventh Circuit is also unfounded. Regulatory policy in the area of agricultural transport differs from the policy applicable to other types of motor carriage. Established law governing liability for cargo loss differs from the law governing and policies toward liability for personal injuries resulting from a traffic accident. There is no conflict between the decision in this case and the decisions of the Seventh Circuit.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit filed by James Dalton should be denied.

Respectfully Submitted,

FELSON BOWMAN

APPENDIX

49 U.S.C. §304(e) and (f):

(e) Regulations governing use of vehicles owned by others.

Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property--

(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof, which requirements may include but shall not be limited to promulgation of regulations requiring liability and cargo

insurance covering all such equipment.

(f) Exceptions to regulations for use of vehicles owned by others.

Nothing in this chapter shall be construed to authorize the Commission to regulate the duration of any such lease, contract, or other arrangement for the use of any such lease, contract, or other arrangement for the use of any motor vehicle, with driver, or the amount of compensation to be paid for such use--

(1) where the motor vehicle so to be used is that of a farmer or of a cooperative association or a federation of cooperative associations, as specified in section 303(b) (4a) or (5) of this title, or is that of a private carrier of property by motor vehicle as defined in section 303(a)(17) of this title and is used regularly in the transportation of property of a character embraced within section 303(b) (6) of this title, and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(2) where the motor vehicle so to be used is one which has completed a movement covered by section 303(b)(6) of this title and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based.

§1057.4 Augmenting Equipment.

Other than equipment exchanged between motor common carriers in interchange service as defined in §1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) Contract requirements. The contract, lease, or other arrangement for the use of such equipment:

. . . .

. . . .

(3) Minimum duration of 30 days when operated by lessor. Shall specify the period for which it applies, which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting:

(i) Equipment used in agricultural or perishable operations. That subject to the proviso in (c) of this subdivision such 30-day minimum period shall not apply to equipment, with driver:

(a) Where the motor vehicle so to be used is that of a farmer or a cooperative association or a federation of cooperative associations, as specified in section 203 (b) (4a) or (5) of the Interstate Commerce Act, or is that of a private carrier of property by motor vehicle as defined in section 203(a)(17) of the Act and is used regularly in the transportation of property of a character embraced within section

203(b)(6) of the Act or perishable products manufactured from perishable property of a character embraced within section 203(b)(6), and such motor vehicle is to be used by the motor carrier in a single movement or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; or

(b) Where the motor vehicle so to be used is one which has completed a movement covered by section 203(b)(6) of the Act and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based; and

(c) Provided, In either instance that prior to the execution of the lease, the authorized carrier receives and retains a statement signed by the owner of the equipment, or someone duly authorized to sign for the owner, authorizing the driver to lease the equipment for the movement or movements contemplated by the lease, certifying that the equipment so leased meets the qualifications enumerated in (a) or (b) of this subsection, and specifying the origin, destination, and the time of the beginning and ending of the last movement which brought the equipment within the purview of this subsection.

. . . .

. . . .

(4) Exclusive possession and responsibilities. Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsi-

bility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

(i) Lessee may be considered as owner. Provision may be made therein for considering the lessee as the owner for the purpose of subleasing under these rules to other authorized carriers during such duration.

. . . .

(5) Compensation to be specified. Shall specify the compensation to be paid by the lessee for the rental of the leased equipment.

(6) Duration to be specific. Shall specify the time and date or the circumstances on which the contract, lease, or other arrangement begins, and the time or the circumstances on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment as required by paragraph (b) of this section; and

(7) Copies of lease and their distribution; copy to be carried on vehicle. Shall be executed in triplicate; the original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d)(2) of this section is carried in lieu thereof.

* * *

(e) Driver of equipment to be in compliance with safety regulations. Before any person other than a regular employee of the authorized carrier is assigned to drive equipment operated under this part, it shall be the duty of the authorized carrier to make certain that such driver is familiar with, and that his employment as a driver will not result in violation of any provision of the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

INDIANA REFRIGERATOR LINES, INC.	:	
v.	:	No. 74-5-NE-CV
JAMES DALTON	:	

MEMORANDUM

On June 19, 1974, this court entered a Memorandum and Order holding that a trip lease indemnity clause could not be enforced against the lessor of a truck and driver to recover damages incurred by the motor carrier lessee as a result of the driver's theft of the cargo. This court was of the opinion that such a recovery would undermine the public policy expressed in 49 C.F.R. §1057.4(a)(4). The Sixth Circuit Court of Appeals reversed the holding of this court and the case was remanded for further proceedings. Indiana Refrigerator Lines, Inc. v. Dalton, No. 74-2197 (6th Cir., May 12, 1975). Essentially, the further proceedings are to determine the

effect of the indemnity agreement and the recovery, if any, under the agreement.

Indiana Refrigerator Lines, Inc. (Indiana), a certificated common carrier, leased a tractor trailer truck and a driver from James Dalton, an exempt carrier of agricultural products, under a trip lease arrangement whereby Dalton contracted to transport a cargo of meat from East Peoria, Illinois, to Salisbury, Maryland.

The lease was entered into by Charles Elmore, one of Dalton's drivers, who stopped in Indiana's terminals in East Peoria, Illinois, to Salisbury, Maryland.

The lease was entered into by Charles Elmore, one of Dalton's drivers, who stopped in Indiana's terminal in East Peoria, Illinois, and signed the agreement as Dalton's authorized agent. After picking up the cargo, Elmore acted in accordance with previous instruction from Dalton and in accordance with Dalton's general custom and practices and drove the leased vehicle from Illinois to Dalton's terminal in Tennessee for a

maintenance check. After Elmore left Dalton's Tennessee terminal en route to Salisbury, Maryland, he stopped in or near Chattanooga, Tennessee, and by virtue of an arrangement, permitted the cargo to be stolen. Elmore was subsequently convicted for his participation in the theft.

Indiana has paid the shipper for the lost cargo and now seeks to indemnify its loss under the following clause in their lease agreement with Dalton:

> Lessor and Lessee agree to abide by the rules and regulations of the Interstate Commerce Commission, including Lessee's assumption of full direction, control, and responsibility for said equipment for the duration of this agreement. Nevertheless, as between Lessor and Lessee, Lessor agrees to protect, defend, indemnify and hold harmless, the Lessee from any and all claims of whatever kind or nature that may arise under this agreement.

The lease also contained the following provision:

> Lessor hereby agrees . . . to indemnify carrier against any losses in connection with this operation.

The defendant advanced three theories to escape liability in this case. The first of these theories was that the indemnity agreement was void

as being contrary to public policy. As previously stated, this defense has now been put to rest. The second defense was that the driver of the vehicle, Elmore, was a "loaned servant" subject to the control and direction of Indiana, and as such, Indiana was responsible for his acts. As an incident to the "loaned servant" defense, Dalton contends that he would not be responsible for the driver's willful conversion of the cargo while the driver was so loaned. The third defense was that the lease agreement did not create a bailor-bailee relationship between Indiana and Dalton with reference to the cargo.

Dalton testified that the only agreement he had with Indiana was the written lease and that the obligations of the parties were contained within the four corners of the lease. He stated that he had no side agreements with any employee of Indiana. Dalton received copies of the contract, he read and understood it, and knew that it was in effect a form contract. The driver, Elmore, was under instruction from Dalton to

report by telephone every day while on the road. Elmore also acted pursuant to the established practice of Dalton when he drove from Indiana's facility in Illinois to Dalton's Tennessee terminal for a check of the truck. The routing through Tennessee constituted a 90% deviation from a straight run from Illinois to Maryland.

Dalton paid the driver, Elmore, by the mile. Also, Dalton furnished the fuel and paid for necessary state permits. Dalton received 78% of the tariff charged to the shipper by Indiana. Indiana did not select the driver and reserved only the right, which was not exercised, to require check calls from certain designated points. Indiana's connection with the driver was that it placed the merchandise on the truck at the point of embarkation and provided him, as agent for Dalton, with the proper bills of lading showing the destination and consignee thereon.

The court notes that the parties have not furnished any citation to Indiana law addressing the "loaned servant" rule. Instead, the parties

have argued this question on the basis of Tennessee law and general common law principles. The rule in Tennessee is that the loaned servant cotrine does not apply unless the original master resigns full control over the employee for the time in question. Chamberlain v. Lee, 148 Tenn. 637, 257 S.W. 415 (1924). In view of the control exercised by Dalton over the driver, some of the indicia thereof having been previously listed, the court concludes that the driver was not a loaned servant who became the employee of Indiana under the facts of this case. However, even if it is assumed that a loaned servant situation existed, there is no public policy with which the court is familiar that prevents the original master and the borrowing master from entering into an indemnification agreement covering the actions of the loaned servant. See: Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc., 507 F.2d 100 (6th Cir. 1974). Certainly, the language in the agreement is broad enough and clear enough to cover such a condition.

An examination of the lease agreement reflects that Dalton agreed to indemnify and hold Indiana harmless from any and all claims of whatever kind or nature which may arise under the agreement. Furthermore, Dalton agreed to indemnify Indiana against any lawsuits in connection with the operation. Keeping in mind the testimony of Dalton that there were no side agreements and that the lease contained the entire agreement, plus the fact that Indiana was seeking a result only (i.e., the transportation of a product from one point to another), and the control exercised by Dalton over his driver and his equipment, it seems clear that the parties intended that Indiana should be reimbursed for all losses which it sustained resulting from the operation and use of the equipment under this trip lease. There is no implication in this record that the indemnity agreement is unfair or unjust. The purpose which the parties intended to reach was that no loss would inure to Indiana by reason of the activities of Dalton or his employees. The specific wording

of the contract, even under a most narrow construction, would so mandate.

In view of the foregoing, the question of whether the agreement created a bailor-bailee relationship between Indiana and Dalton is not determinative of liability and the court concludes that it is not necessary to decide whether such a relationship was created. The indemnity agreement is valid and Dalton is liable thereunder.

With reference to the question of damages, the undisputed proof shows that Indiana notified Dalton immediately upon ascertaining that the cargo was lost and that Dalton was expected to assume liability for the loss. Indiana sent an agent to Chattanooga who, with some effort, located portions of the cargo in various retail stores in that city. A limited recovery was obtained through the agent's efforts; however, the major portion of the merchandise was never found. Thereafter, Indiana paid the shipper $32,399.64 to cover the lost cargo.

The expense of the agent traveling to

Chattanooga, Tennessee, to assist in the recovery of the merchandise was $300.00. The meat which was recovered was impounded by the local law enforcement officers to be used as evidence in a criminal trial. The meat was so retained from August of 1972 until February of 1973, when it was released as a result of actions taken by an attorney employed by Indiana. The attorney's fees amounted to $400.00. After recovery of the meat, it was necessary to transport it back to Illinois, trim it, rebox it, and attempt to resell it. The total cost of this procedure was $4,468.32. The total out of pocket expenses of Indiana was $34,567.96. The total received on the resale of the meat recovered was $9,131.09, making a net loss of $25,436.87.

The court finds as reasonable the expenses of the agent flying to Chattanooga, Tennessee, and assisting in the recovery of the meat. The court further finds the attorney's fee of $400.00 to be a reasonable expense in an effort to obtain release of the impounded meat. Both of these expenses were

in mitigation of damages. The court also finds that the expenditure of $1,468.32 in re-preparing the meat for sale was a reasonable expenditure in mitigation of damages. Therefore, the court finds that a judgment in favor of Indiana Refrigerator Lines, Inc. against James Dalton in the amount of $25,436.87 is reasonable and proper.

An appropriate order will be entered.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

INDIANA REFRIGERATOR LINES, INC.	:	
v.	:	NO. 74-5-NE-CV
JAMES DALTON	:	

ORDER

In accordance with the Memorandum contemporaneously filed, it is ORDERED that a judgment is

granted in favor of Indiana Refrigerator Lines, Inc. against James Dalton in the amount of $25,436.87.

UNITED STATES DISTRICT JUDGE